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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 215

DAVID FASS, ET AL.

v.

CARL R. GRAY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (R. 64-66, 136-138) are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1952. The petition for a writ of certiorari was filed on July 21, 1952. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Civil Service Regulation 20.9(b), *infra*, p. 4, limiting reassignment rights of preference employees reached for separation in a reduction in force to positions within the local commuting area for which they are fully qualified, is valid.

2. Whether Section 14 of the Veterans Preference Act, *infra*, p. 3, applies where demotion or separation is a result of reduction in force.

STATUTES AND REGULATIONS INVOLVED

Section 12 of the Veterans Preference Act of 1944 (58 Stat. 387, 390, 5 U.S.C. 861) reads in relevant part as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in

preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

Section 14 of the Veterans Preference Act of 1944, 5 U.S.C. 863, provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, * * * shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension, [etc.] * * * is sought shall have at least thirty days' advance written notice * * *, stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer * * *.

Section 4 of the Act of August 23, 1912 (37 Stat. 413, repealed by the Act of September 30, 1950, Pub. L. 873, 81st Cong., 2d Sess., Sec. 11) provided:

> That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

Part 20 of the Civil Service Regulations establishes retention preference regulations for use in reductions in force. Section 20.9, as it read when this case arose, provided (15 F.R. 49, Jan. 7, 1950):[1]

> Sec. 20.9 *Actions*—(a) *In general.* Employees who cannot be retained in their positions because of a reduction in force shall be reassigned to continuing positions, furloughed, or separated. * * *
>
> (b) *Reassignments to continuing positions.* Reassignment is required in lieu of separation or furlough, within the local commuting area, without interruption to pay status whenever possible, to an available position for which the employee is fully qualified, unless a reasonable offer of reassignment is refused. No displacement will be required to permit the reassignment of an employee unless such employee is fully qualified to perform the duties of the position in question.

STATEMENT

Each of the nine petitioners, honorably discharged veterans, was an employee of the Veterans Administration in the New York area. In March and April, 1950, pursuant to a reduction in force order, each petitioner was reached for separation from the position which he occupied at the time of the order.

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[1] By an amendment dated July 6, 1951, the word "fully" was deleted from the phrase "fully qualified" in Section 20.9(b), 16 F.R. 6609.

In addition to a preference employee's statutory retention right the regulations promulgated under Section 12 of the Veterans Preference Act of 1944 (*supra*, pp. 2-3) provide that an employee who is reached for separation in the position which he occupies shall be reassigned to another position within the local commuting area for which he is fully qualified. If such a position is available, he has a right to displace its incumbent, provided the incumbent has a lower retention rating. 5 C.F.R. 20.9, *supra*, p. 4.

In accordance with the applicable regulations, each petitioner was notified that he was to be separated; his qualifications for reassignment to other available positions were appraised by personnel officials of the Veterans Administration; and as a result of administrative determination and review, petitioners Fass, Candell, Fetell, Ross, Schoenwald, and Thaller were reassigned to other positions with the Veterans Administration in the [redacted] New York area, though at a lower grade and salary. No positions were found to be available for petitioners Jankowitz, Lerner, or Nelson, and they were accordingly separated from the service.

In this action against Carl R. Gray, Jr., Administrator of Veterans' Affairs, petitioners seek a declaratory judgment that the action of the Veterans Administration was null and void, and an order reinstating each of them to his former position, grade and salary, with back pay to the date of demotion or separation. They complain, first, that their veterans preference rights were violated by

the Civil Service Commission regulations (5 CFR 20.9(b), *supra*, p. 4) which entitled them to reassignment only "within the local commuting area" and to positions for which they were "fully qualified." Second, they urge that Section 14 of the Veterans Preference Act of 1944 (*supra*, p. 3) applies to reductions in force and that the notice requirements of this section were not met in their case.

The District Court sustained the respondent's cross motion for summary judgment and the Court of Appeals affirmed, upholding the validity of the regulations and ruling that Section 14 is inapplicable to separations or demotions occasioned by reductions in force.

ARGUMENT

1. It is no longer open to dispute that a veteran's preference operates only within a competing group. *Elder* v. *Brannan*, 341 U.S. 277. As the rationale of *Elder* v. *Brannan* makes clear, this was as true before the Veterans Preference Act of 1944 as it is today, since the 1944 Act, with its express reference in Section 12 (*supra*, p. 2) to "competing employees", was intended, not to reduce veterans' preference, but "to 'give legislative sanction to existing veterans' preference' and to 'give some additional strength' to that preference."[2] Thus, whether it is considered under the repealed Act of 1912 (*supra*, p. 3) or under the current Act of

[2] 341 U.S. at 284, quoting from Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong., 2d Sess. 8-9, and 90 Cong. Rec. 3505 (1944).

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1944,[3] there is no merit in petitioners' argument that Civil Service Commission regulation 20.9(b) was invalid in limiting reassignment rights of a preference employee to positions "within the local commuting area * * * for which the employee is fully qualified * * * *." For Congress necessarily left to the Commission the definition of competing groups,[4] and the regulation is a wholly reasonable and proper discharge of that function.

a. In the teeth of *Elder* v. *Brannan*, *supra*, and of long-settled administrative practice, petitioners suggest (Pet. 9, 16-17) that a veteran with an efficiency rating of good or better has an "absolute" preference, without regard to any groupings of competing employees. Even as an original proposition, the suggestion would be wholly lacking in merit; it is inconceivable, for example, that Congress intended a typist with preference to displace a physicist without preference. But it is too late

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[3] Petitioners place their reliance essentially on the Act of 1912, which did not contain the express reference to "competing employees." Insofar as this emphasis suggests that veterans' preference was broader under the 1912 Act than under the 1944 Act, the argument is baseless. It is an argument, moreover, which was rendered wholly unimportant by the repeal of the 1912 Act. Act of Sept. 30, 1950, Pub. L. 873, 81st Cong., 2d Sess., Sec. 11.

[4] Section 19 of the Veterans Preference Act of 1944, 58 Stat. 391, 5 U.S.C. 868 provides: "It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof." More specifically, Section 12 (*supra*, p. 2) provides that in effecting reductions in personnel, "competing employees shall be released in accordance with Civil Service Commission regulations * * *."

to require extensive demonstration that veterans' preference is properly accorded only within competing groups of employees. Long administrative practice, in itself a weighty argument for validity (*Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, 549), testifies to the need for and the propriety of confining preference to competing groups. See, *e.g.*, 34 Op. A.G. 159, 161 (1924); Executive Order 4240 (1925); Executive Order 5068 (1929); Executive Order 8705 (1941), 6 F.R. 1313, 5 CFR (1941 Supp.) 12.5. The approval of Congress and this Court have left no ground for disputing this practice. *Elder* v. *Brannan*, *supra*.

Hilton v. *Sullivan*, 334 U.S. 323, does not support petitioners' contrary view. As *Elder* v. *Brannan* shows, while there are unquestionably limitations of reasonableness and appropriateness upon the Commission's power to define competing groups, some definition is necessary and proper. And the particular standards petitioners attack here clearly meet the test.

b. Regulation 20.9(b) (*supra*, p. 4), in limiting reassignment rights to "the local commuting area," is a reasonable definition of "competing employees," fully justified by the Commission's "authority and duty * * * to make and enforce appropriate rules and regulations * * *." *Supra*, note 4, p. 7. As the court below observed (slip op. p. 9), the term "competing employees" has "long been interpreted to include the factor of location."

In 1934, in an opinion to the Secretary of Agriculture, the Attorney General wrote, regarding the veterans preference of an employee involved in a proposed reduction in force (38 Op. A.G. 79, 82, 83):

> * * * I concur in the conclusion of your Solicitor that the employee is to be considered as in competition only with other employees at the Chicago Station [where the reduction in force was contemplated], within the contemplation of the Executive order relating to military preference. This view, as I am also informed, has been generally accepted and applied, and a strong presumption of correctness attaches to the administrative construction thus evidenced. Furthermore, the contrary view would be highly impracticable of application, requiring the transferring of employees from one station to another, perhaps far distant, in order to accomplish a reduction in force in a single office.

As petitioners point out (Pet. 17-18, 23), the Civil Service Commission's Regulations of July 31, 1943 (8 F.R. 10921, 5 CFR (1943 Supp.) 12.303) expressly defined preferential retention rights in terms of "geographical location", specifying that, "Ordinarily, organization units located within the same local commuting area shall not be considered to be materially distinct from each other in geographical location."

Similarly, the first definitive regulation under the 1944 Act confined reassignment rights of preference employees to "a continuing position at the

same geographical location." 5 CFR (1944 Supp.) 12.309(c). As so limited, this regulation continued in effect until 1947, when reassignment of A-1 preference employees [5] was authorized to a geographical area other than the one in which the reduction in force was made. This limited extension of the right to reassignment was confined, however, to employees with five or more years of Government service and was limited to vacant positions or to positions occupied by a war service or temporary employee at another geographical area. 5 CFR (1947 Supp.) 20.9(d). The right to reassignment to another geographical area was further extended, effective September 1, 1949, to entitle A-2 preference employees [6] with five or more years of service to displace employees not in Group A. 14 F.R. 3607, 3610, July 1, 1949.

This experiment with limited rights of reassignment beyond the local area was abandoned less than six months later and the regulation was adopted substantially as it stands today—confining reassignment rights to the local commuting area. 15 F.R. 49, Jan. 7, 1950; 5 CFR (1949 ed.) 20.9(b). From the short duration of the extended reassignment right, it is a reasonable inference that the practice was administratively unworkable.

In any event, the present geographical limitation is a reasonable implementation of the veterans'

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[5] Employees with competitive status, an efficiency rating of not less than "good," and veterans' preference.

[6] Employees with competitive status and an efficiency rating of not less than "good," but without veterans' preference.

preference provisions. It defines "competing" employees as broadly as is administratively and economically feasible, bearing in mind that the right to reassignment entails the right to displace an incumbent employee of lower retention preference who is in turn entitled to reassignment. Considering, furthermore, the highly relevant fact that reductions in force almost invariably result from a lack of funds, it is clear that this "bumping" process, if permitted to operate over a wide geographical area, would produce intolerable burdens of disruption and expense.

c. Equally reasonable is the provision in Section 20.9(b) of the Commission's Regulations limiting reassignment rights to positions for which the employee is "fully qualified."[7] The requirement that a preference employee be capable of performing the duties of the position to which his preference is to entitle him, far from being novel or questionable, is well established by congressional and administrative policies which merely reflect the plain necessities of the problem. As early as 1865, Congress provided "That persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, should be preferred for appointments to civil offices, *provided*

[7] As we have noted (*supra*, note 1), the word "fully" was dropped from the phrase "fully qualified" on July 6, 1951, after the events which give rise to this case. The Commission explained that some agencies, particularly in the field service, were unduly restricting the application of the original term. 16 F. R. 6609.

they shall be found to possess the business capacit necessary for the proper discharge of the duties o such offices." Res. 27, 38th Cong., 2d Sess., Marc 3, 1865, 13 Stat. 571 (emphasis added). In Sec tion 3 of the Act of August 15, 1876, 19 Stat. 16 5 U. S. C. 37, Congress directed "That in makin any reduction of force in any of the executive de partments, the head of such department shall re tain those persons who may be *equally qualified* wh have been honorably discharged from the military or naval service of the United States * * *" (emphasis added).

Section 20.9(b) is but a continuation of the con sistent practice which has been followed in reduc tions in force. The 1938 Regulations provided that "In making a reduction in force, only those employees * * * who are engaged in the same line of work are to be considered as in competition with each other." 5 CFR (1938) 12.105(b). This relatively restrictive definition was supplanted in 1943 to provide that no employee entitled to mili tary preference should be separated instead of being demoted unless it could be demonstrated that he "could not perform the duties of the lower grade position within a reasonable training pe riod." 5 CFR (1943 Supp.) 12.309(a).

Under the 1944 Act, with some variations in lan guage, the regulations have continued a substan tially similar definition—describing the type of position to which a preference employee is entitled to be reassigned as one which he "is qualified to fill without undue interruption to the activity in-

volved" (5 CFR (1944 Supp.) 12.309(c)), or, simply, one "which he is qualified to fill" (5 CFR (1947 Supp.) 20.9(c). The term "fully qualified," adopted in 1949 (14 F.R. 5753), was explained in the Federal Personnel Manual as follows (p. R. 3-13):

> * * * To be "fully qualified" the employee must have the knowledges, skills, techniques, and adaptability required in the position and be capable of assuming and performing acceptably the duties thereof without training in the basic fundamentals of the position. However, it must be recognized that a reasonable amount of instructions depending upon the nature of the duties of the position, may be necessary in some cases to familiarize an employee with the organizational structure, and workload * * * "

Thus, in its practical application the term "fully qualified" did not differ materially from prior regulations. It is but a variation in the terminology describing the Commission's time-honored practice in reassignment of personnel. *Cf. Powell* v. *Brannan,* 196 F. 2d 871 (C. A. D. C.). Even apart from the fact that it plainly conforms to the policies of Congress, it is difficult to imagine a qualification more reasonable and more essential to prevent unthinkable impairment in the federal service.

2. Petitioners "reserve the objection" (Pet. 34-35) that Section 14 of the Veterans Preference Act of 1944 (5 U. S. C. 863, *supra,* p. 3) was vio-

lated in this case because (1) petitioner Jankowitz's notice, though extended to 30 days before his dismissal, was originally for only 29 days, and (2) the notice given was "notice of dismissal within thirty days," not "notice of the time after which a decision will be rendered and action taken on a proposed course." The short answer to this objection is that Section 14 is plainly inapplicable to separations or demotions resulting from reductions in force. *Ashley* v. *Ross*, 191 F. 2d 655 (C. A. D. C.). As the statutory language and the cited decision make clear, Section 12, which omits the thirty-day notice requirement, governs reductions in force. Section 14, regulating separations or demotions "for cause," affords no basis for the view that Congress intended "that in reductions in force large numbers of employees must be retained on the public payroll in a pay status for at least thirty days before they are released, although there may be no work for them to do, no funds from which to pay them, or both." *Id.* at 656. The Court of Claims decisions petitioners invoke (*Stringer* v. *United States*, 90 F. Supp. 375; *Lamb* v. *United States*, 90 F. Supp. 369), neither of which involved a reduction in force, are irrelevant.

CONCLUSION

The decision below is clearly correct and accords with prior decisions of this Court. There is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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